

36.1 Nonconforming Uses – Generally. Where a city’s code conditionally permits cellular antennae on existing buildings, a city decision that denies a request for conditional use approval to site cellular antennae on an existing water tower simply because the water tower is an existing nonconforming structure will be remanded, where there is no language in the city’s code that would permit such a limitation and the city provides no explanation for reading such a limitation into its code. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. Where a city’s code distinguishes between nonconforming uses and nonconforming structures and extinguishes the right to reinstate nonconforming uses that are discontinued but allows nonconforming structures to remain in place even though their use may be discontinued, a city errs in finding that ceasing to use a water tower as part of the city’s water system had the effect extinguishing the legal right of the water tower to remain in place as a legal but nonconforming structure. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. A resolution that adopts a revised franchise agreement between the county and a landfill operator does not constitute a *de facto* nonconforming use determination subject to LUBA’s jurisdiction, where the resolution makes no determination whatsoever about the lawfulness or status of the landfill. *Kamp v. Washington County*, 54 Or LUBA 717 (2007).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a city’s code distinguishes between nonconforming uses and nonconforming structures and extinguishes the right to reinstate nonconforming uses that are discontinued but allows nonconforming structures to remain in place even though their use may be discontinued, a city errs in finding that ceasing to use a water tower as part of the city’s water system had the effect extinguishing the legal right of the water tower to remain in place as a legal but nonconforming structure. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. A planning staff decision that a proposed crematory expansion to a nonconforming mortuary use is an outright permitted use in a residential zone will be remanded, where the decision does not explain the basis for that conclusion and the city’s code appears to prohibit expansions of nonconforming uses. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

36.1 Nonconforming Uses – Generally. Like the statutes governing nonconforming uses, ORS 197.770 does not specify what period of discontinued use as a firearms training facility disqualifies a facility from protection under the statute, but instead leaves it to the local government to determine. Where the local government’s regulations provide a period of discontinuance for nonconforming uses but not a specific period for firearms training facilities, LUBA will assume the nonconforming use period of discontinuance applies. *Citizens for Responsibility v. Lane County*, 51 Or LUBA 588 (2006).

36.1 Nonconforming Uses – Generally. ORS 215.130(10)(a) authorizes counties to adopt a procedure whereby an applicant may limit its proof of the “existence, continuity, nature and extent” of an alleged nonconforming use to the 10 years that precede the application. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.1 Nonconforming Uses – Generally. The rebuttable presumption that is authorized by ORS 215.130(10)(a) applies to both parts of the inquiry that is necessary under ORS 215.130(5) to verify a nonconforming use, *i.e.* that the use existed on that date and that its existence was lawful. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.1 Nonconforming Uses – Generally. When a nonconforming use application does not distinguish between commercial and noncommercial use of a nonconforming go-cart track, and the evidence submitted also does not make such a distinction, a decision maker does not err in considering both commercial and noncommercial use of the go-cart track in determining the scope of the nonconforming use. *Lawrence v. Clackamas County*, 46 Or LUBA 101 (2003).

36.1 Nonconforming Uses – Generally. The ORS 215.130(5) requirement that local governments allow alterations to a nonconforming use “necessary to comply with any lawful requirement for alteration in the use” applies to circumstances where a regulatory agency or similar authority requires changes to a nonconforming use in order to continue the use, not to circumstances where the operator of the nonconforming use is subject to general, open-ended statutory or regulatory obligations. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.1 Nonconforming Uses – Generally. A 1962 order from the Public Utility Commission granting a public utility its service area and statutes generally requiring that public utilities provide safe and reliable electrical service within their service areas do not constitute “lawful requirements for alteration of the use” under ORS 215.130(5) sufficient to mandate county approval of proposed alterations to upgrade the capacity of a nonconforming electrical transmission line. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.1 Nonconforming Uses – Generally. An appeal of a county decision verifying a nonconforming use is not necessarily moot simply because the subject property is annexed into a city after the appeal to LUBA is filed. Although city annexation means that the county loses jurisdiction over the subject property, annexation does not affect the validity of the county decision, and LUBA’s review of the county decision will continue to have a practical effect on the parties. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. ORS 215.130(5) through (11) recognizes (1) “alterations” to a nonconforming use, (2) maintenance of existing structures associated with the use in good repair, and (3) restoration or replacement of a nonconforming use made necessary by fire or other casualty. The statute does not include an implicit fourth category of changes to nonconforming uses that reduce

adverse impacts from that use. Such changes are “alterations” that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. Maintenance of existing structures associated with a nonconforming use in good repair under ORS 215.130(5) includes incremental replacement of structural components, at least where the structure as a whole is not substantively replaced and the installed components are similar in function to those replaced. Such incremental replacements are not alterations that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. In determining that an applicant failed to carry his burden to demonstrate that a proposed home occupation would be carried out inside a building and in a manner that would not unreasonably interfere with other uses, the county did not err by considering existing and past conditions on the property. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

36.1 Nonconforming Uses – Generally. A city does not err by applying its more stringent nonconforming use criteria to a portion of a property located within city limits and concluding that a nonconforming use on city property has been lost, notwithstanding a county decision that the portion of the property lying outside of city limits retains its nonconforming use status based on the application of county nonconforming use standards. *ODOT v. City of Mosier*, 41 Or LUBA 73 (2001).

36.1 Nonconforming Uses – Generally. Statutory nonconforming use provisions at ORS 215.130 do not prohibit rezoning land to allow uses that would not be allowed to continue as nonconforming uses. Nor is the statute violated or undermined by the county’s consideration of a history of illegal commercial uses, in applying a plan provision that allows land that has an “historical commitment” to commercial uses to be rezoned for commercial use. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

36.1 Nonconforming Uses – Generally. ORS 215.130(10) and (11) authorize a county to adopt a process to document a preexisting nonconforming use, within certain parameters. The statute does not prohibit persons other than the proponent of the nonconforming use from providing evidence regarding the existence of the nonconforming use. *Besseling v. Douglas County*, 39 Or LUBA 410 (2001).

36.1 Nonconforming Uses – Generally. A vested right based upon substantial expenditures toward construction of a building is properly viewed as an inchoate nonconforming use, not as a distinct entitlement immune from all limitations applicable to nonconforming uses. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.1 Nonconforming Uses – Generally. Vested rights, like nonconforming use rights, may be lost where the holder fails to diligently exercise those rights, *i.e.*, the holder must continue development of the nonconforming use and not abandon or discontinue efforts

to complete development. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.1 Nonconforming Uses – Generally. The rebuttable presumption provided by ORS 215.130(10)(a) creates the possibility of verifying the lawful creation and continued existence of a nonconforming use by proving the continued existence of the use for the past 10 years only. However, once the presumption has been rebutted, the applicant must show the use existed at the time of zoning and has continued, uninterrupted, since that date. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.1 Nonconforming Uses – Generally. Nothing in ORS 215.130(10)(a) requires that the rebuttable presumption provided by that statute can only be rebutted by “clear and convincing” evidence. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.1 Nonconforming Uses – Generally. The rebuttable presumption provided by ORS 215.130(10)(a) does not shift the applicant’s ultimate burden of proof to demonstrate compliance with all applicable approval criteria. Where a party produces sufficient evidence of the continued existence of a nonconforming use for the prior 10-year period, the statute then shifts the burden of going forward with countering evidence to the county or any party opposing the nonconforming use. When sufficient evidence is produced showing that the nonconforming use was interrupted during some period, the applicant may no longer rely on the presumption with regard to that period of interruption. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.1 Nonconforming Uses – Generally. Where provisions allowing enforcement of the city’s ordinance only specifically authorize judicial remedies, the city’s interpretation of the enforcement provisions as allowing the city to conduct quasi-judicial proceedings to determine nonconforming use status is inconsistent with the terms of that provision and not entitled to deference under *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992) or ORS 197.829(1). *Dept. of Transportation v. City of Mosier*, 35 Or LUBA 701 (1999).

36.1 Nonconforming Uses – Generally. LUBA owes no deference to a county’s interpretation of ORS 215.130, governing nonconforming uses, or ordinance provisions that implement the statute. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Where LUBA determined in an earlier appeal of the county’s approval of a nonconforming use that the nonconforming use was not established by a prior county decision approving site design review for that use, the law of the case doctrine prohibits the county, on remand, from revisiting the issue decided by LUBA. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Principles of *res judicata* do not prohibit petitioner from raising issues before LUBA regarding the nonconforming use status of a proposed dog kennel, even if those issues could have been raised in an earlier, unappealed county decision approving site design review for the kennel, because the

nonconforming use status of the proposed use was not at issue during the site design review proceedings. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. A county is not equitably estopped from denying the nonconforming use status of a dog kennel because of the applicant's reliance on a previous county decision approving site design for a dog kennel. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Demonstrating that one nonconforming use was legally established on a property does not automatically authorize other uses in the same use category that may subsequently have been established on the property. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

36.1 Nonconforming Uses – Generally. That a use is authorized under a zoning ordinance or granted building or zoning permits does not, alone, shield the use from later-adopted zoning ordinance amendments that prohibit the use or impose a requirement for additional permits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

36.1 Nonconforming Uses – Generally. So long as a nonconforming use has not been abandoned or discontinued, as provided by local ordinance, the nonconforming use has a right to continue, regardless of whether it complies with local regulations that would govern a new, conforming use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.1 Nonconforming Uses – Generally. The protected right to continue a nonconforming use is a right to continue the nature and extent of use that existed at the time the use became nonconforming. The proponents of a nonconforming use have the burden of producing evidence from which a local government can make an adequate determination of the nature and extent of the nonconforming use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.1 Nonconforming Uses – Generally. Where applicants wish to establish the scope of a nonconforming use, they have the burden of producing evidence from which the local decision maker can determine the scope of the nonconforming use. If applicants present nonspecific information, they run the risk that reasonable people, including the local decision maker, will disagree with them concerning the scope of the nonconforming use. *Warner v. Clackamas County*, 25 Or LUBA 82 (1993).

36.1 Nonconforming Uses – Generally. Where the challenged decision characterizes an alleged nonconforming use as a "reprographics, blueprint and printing business," and petitioner does not challenge that characterization in his petition for review, petitioner may not challenge the characterization for the first time in post oral argument memoranda. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

36.1 Nonconforming Uses – Generally. The statutory provisions set out at ORS 215.130 governing regulation of nonconforming uses apply to counties, not to cities. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

36.1 Nonconforming Uses – Generally. Neither ORS 215.130 nor 215.215 authorizes the creation of new parcels for nonconforming uses. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

36.1 Nonconforming Uses – Generally. Because a nonconforming use is tied to the land on which it was lawfully established, it essentially belongs to the property owner, and there is no inherent reason why a tenant, with the permission of the property owner, may not apply to the local government for permission to expand the nonconforming use. *Berteau/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.1 Nonconforming Uses – Generally. In reviewing a local government decision concerning a nonconforming use, LUBA may consider a letter which was not submitted to the decision maker during the local proceedings leading to adoption of the *initial* decision, but was submitted to and considered by the decision maker during *reconsideration* proceedings. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

36.1 Nonconforming Uses – Generally. Where the local code distinguishes between, and imposes different criteria on, nonconforming uses and nonconforming structures, a change from one conforming use to another conforming use need not comply with the criteria applicable to changes in nonconforming uses, even though the existing structure may be nonconforming. *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

36.1 Nonconforming Uses – Generally. Whether a proposed dwelling (1) is permitted outright in an EFU zone, (2) is "accessory" to an underlying nonconforming use, and (3) complies with ORS 215.296(1), are determinations which require "interpretation or the exercise of factual, policy or legal judgment" within the meaning of ORS 197.015(10)(b)(A) and (C). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

36.1 Nonconforming Uses – Generally. Since the reference in ORS 215.130(5) to the right to continue a lawful use after "the enactment or amendment of any zoning ordinance or regulation" refers to *county* regulations, ORS 215.130(5) does not apply to the continuation of nonconforming uses within *cities*. *Goodman v. City of Portland*, 19 Or LUBA 289 (1990).